1985

The Christian Peace Ethic and the Doctrine of Just War from the Point of View of International Law

Jost Delbruck
Indiana University Maurer School of Law

Klaus Dicke

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub

Part of the International Law Commons, and the Military, War, and Peace Commons

Recommended Citation
Delbruck, Jost and Dicke, Klaus, "The Christian Peace Ethic and the Doctrine of Just War from the Point of View of International Law" (1985). Articles by Maurer Faculty. 2828.
https://www.repository.law.indiana.edu/facpub/2828

This Conference Proceeding is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
The Christian Peace Ethic
and the Doctrine of Just War
from the Point of View of International Law

by Jost Delbrück and Klaus Dicke

Introductory Remarks*

The question of war and peace posed in an ethical perspective is much older than international law and thus also much older than international law concerns with and answers to the problem of war and peace, since international law as an inter-state legal order only dates back to the 16th/17th century, when independent territorial entities (states) began to replace the mediaeval feudal order. Questions posed and answers given by peace ethics have, however, always been related to the positive law existing at a given time, as ethics and law cannot be considered independently of each other. The task set for this paper, therefore, is to contribute an analysis of how the Doctrine of Just War is perceived by the international law of today — an analysis which will be based on the historical pronouncements on the problem of war and peace by peace ethics as well as by international law. The task is a formidable one, given the very complex nature of the problems involved. Among others, it firstly touches upon fundamental questions about the structure of the international order; secondly, it involves the relationship between law and the use of force, or non-violence, in the light of a multitude of grave injustices in the world while at the same time objective terms and consented criteria of what is just are lacking; and thirdly, it has to focus on an ethical and legal evaluation of the phenomenon of war under the conditions of the nuclear age. The task given is further complicated in view of the abundant material to be covered.¹ In view of these difficulties, it cannot even be attemp-

* The following two articles are revised english versions of contributions prepared for the Kieler Woche Kongreß 1984 "Gottes Friede den Völkern". The proceedings of this congress have been published by Ulrich Wildens / Eduard Lohse (eds.), Gottes Friede den Völkern, Hannover 1984.

Doctrine of Just War

ted to propose any final answers. Rather, the paper can offer only some basic contributions to a discussion which is currently undertaken as an internal one within the churches and which — as one may observe — shows much of an aporetic character and yet must be continued. Just as ethical discussions are characterized by sometimes strongly divergent opinions, international law treatment of the Doctrine of Just War — insofar as it is undertaken at all — shows a broad range of views expressed. These range from a linear projection of the Augustinian-Thomistic doctrine of bellum iustum into the present world to the total rejection of the doctrine as irrelevant to international law and include, e.g., the proposition that international law has overcome the doctrine.\(^2\)

In a first section of the paper the development of international law pronouncements on the bellum iustum Doctrine will be sketched out (I). In a second section, the question whether the bellum iustum Doctrine is relevant to present day international law or whether the doctrine has been overcome, will be treated in the light of the outlawing of the use of force (II). Finally, tendencies in international law to revive the Doctrine of Just War — as they can also be discerned in the discussion of peace ethics — and the problems

\(^2\) Inis L. Claude, Just Wars: Doctrines and Institutions, in: Political Science Quarterly 95 (1980), 83—96; for the Augustinian-Thomistic doctrine see: Klaassen (note 1), 12—21; Paulus Engelhardt, Die Lehre vom "gerechten Krieg" in der vorreformatorischen und katholischen Tradition, in: Steinweg (ed.) (note 1), 72—124.

and dangers implied in these tendencies for the structure of the international order will be outlined (III).

I. The Doctrine of Just War in the Development of International Law until the End of World War I

International law as an inter-state legal order has been fully in keeping with the *Augustinian-Thomistic* Doctrine of Just War only in its very beginnings which were shaped by the Spanish Scholastics. When the so-called “fathers of international law” — among others, Bartolomé de Las Casas (1474—1566), Francisco di Vitoria (1480—1546) and Francisco Suarez (1548—1617) — began to discuss the Spanish colonial expansion in the New World in terms of the Doctrine of Just War, and thereby laid the foundations of international law, the Doctrine of Just War as a combination of Roman political philosophy (Cicero) and Christian ethics (St. Augustine, Thomas Aquinas) and could be summarized as follows:4 A war is a “just war”, if it is waged by the legitimate government (*auctoritas principis*) — be it as an aggressive or a defensive war —; if secondly, a just cause (*iusta causa*) can be shown for waging the war — be it for defending against an illegal attack, or for the reason of restoring the law violated by the other party; and finally, if the war is conducted in the right intention (*recta intentio*) in the sense, that good shall prevail over evil. The overall aim of the war had to be peace in the sense of a just order or — as it is put in a different version — in the sense of order and harmony5. Based on this aim the function of the Doctrine of *bellum iustum* was to limit war, that is, to limit its initiation as well as its conduct. This limiting function could be performed by the Doctrine of Just War only because it was based on a value system which was recognized universally as objective and which provided the criteria for judging what was to be considered “just”, “good” or “bad”, and thereby set clear and relatively narrow limits to an arbitrary instrumentalization of war. In view of the basic consent of the time, it is not by chance that one spoke of “just war” and not of “justified war”: the problem was not — in modern legalistic terms — to justify war in a particular case as an otherwise illegal act. Rather, the idea was that war, in meeting the ethical criteria of the Doctrine of Just War, was

---

4 On the historical roots of just war theory see: Reibstein (note 1); Klaasen (note 1); Kimminich (note 3); Wilhelm Grewe, Epochen der Völkerrechtsgeschichte, Baden-Baden 1984, 131—147; Frederick H. Russel, The War in the Middle Ages, Cambridge 1975.

5 The Concept of order and harmony as a concept of peace was developed by Augustine and Thomas Aquinas along the terms of the Aristotelian philosophy of order. See: Hans Buchheim, Aurelius Augustinus' Friedensbegriff als Konzept einer modernen Theorie des Friedens, in: Fs. Wilhelm Grewe, Baden-Baden 1981, 425—444 (428); Max Müller, Der Friede als philosophisches Problem, in: id., Erfahrung und Geschichte. Grundzüge einer Philosophie der Freiheit als transzendentale Erfahrung, Freiburg/München 1971, 357—374.
per definitionem a just act which could even be ethically mandatory.\(^6\)

Legal and moral authority, legal and ethical argument had not been distinguished\(^7\).

Under the impression of reports of the cruel subjugation of the Latin American Indios, the Spanish Scholastics posed critical questions with regard to the traditional Doctrine of Just War. Although not totally denying the right of the Spanish King to conquer the New World, they began, however, to make distinctions in applying the criteria of the Just War Doctrine to the war against the Indios. In doing so, they questioned the existing consensus about the unreflectedly accepted criteria of just war as such. Thus, for instance, Vitoria wanted to have a distinction drawn on the side of the unjust party of a war between an intended injustice for which the party could be held subjectively responsible, and an objective injustice.\(^8\) Different legal consequences were to be accorded to these two sets of circumstances: in case of an objective injustice the unjust opponent could be subjugated only, while in the former case both subjugation and punishment were the proper sanctions. This was an important distinction with regard to the Indios’ fate. Withholding punishment meant — at least theoretically — the chance for the subjugated Indios to be integrated into the peace order established after the war ended.

On the theoretical level, such distinctions meant that the catalogue of criteria of just war was now open to an ever increasing relativity of the individual criterion. It was no great step from the distinction between “intended” and “objective” injustice to the consideration whether both parties to a war could have just causes on their side — in their subjective judgement, at first, and later also objectively. The way to an increasing dissociation of peace ethics vested with absolute authority and the relativist juridical outlook was theoretically paved. The Doctrine of bellum iustum lost its formerly effective function to limit war.

\(^6\) The mandatory character of a just war is asserted by various concepts of “holy war”. See, e.g., Christiane Rajewsky, Der gerechte Krieg im Islam, in: Steinweg (ed.) (note 1), 13—71 (19—21). Johnson (1975) (note 1), 144—148, pointed out that the American tradition of just war theory derives from the intellectual heritage of the holy war doctrine in post-reformation England.

\(^7\) The emergence of a distinction between legal and moral authority has been one of the most significant developments in legal thought between the 16th and 17th century. See, David Kennedy, Primitive Legal Scholarship, in: Harvard International Law Journal 27 (1986), 1—98. This distinction and its peacekeeping function for any legal system is distorted, when just war theorists refer to the philosophical bellum justum tradition and the legal ius in bello norms at the same time without any regard for the difference between moral and legal obligation.

\(^8\) Kimminich (note 3), 208/9. To establish such a distinction, Vitoria refers expressively not to objective criteria of just and unjust, instead he is one of the first seeing the upcoming function of public opinion as the legitimate judge in questions of public justice. See Engelhardt (note 2), 91, 94.
When the mediaeval system faltered politically and spiritually, and the new territorial entities arose, *i.e.* the modern state system emerged, and when, finally, two separate Churches were established, the new notions of the criteria of just war were applied in practice. Sovereign princes and states of equal standing confronting each other in case of a conflict, acted as their own judges over the justice of their causes.\(^9\) The *bellum iustum “ex utraque parte*” as a new notion was formulated by Vitoria for the first time.\(^10\) It was taken over by Alberico Gentili (1552—1608)\(^11\) and by Hugo Grotius (1583—1645) in his monumental international law treatise “*De jure belli ac pacis*” and was thereby introduced into the teaching of classic international law.\(^12\) Soon brought to its extreme, the notion led to the proposition and acceptance of the free right of the sovereign state to go to war (*liberum ius ad bellum*). International law and peace ethics from now on went their own ways. While on the part of the Protestant Church the preservation of peace and the settlement of disputes by arbitration were postulated, and defensive war was accepted as a just war only when embarked upon as *ultima ratio*\(^13\), international law freed itself of the fetters of the Just War Doctrine. The loss of the unity in faith and of a shared trust in true values was intensified in the practice of international law by the influence of Machiavellian thought which did not treat the question of war in ethical terms, but only with regard to the interests of the state.\(^14\)

International law during the 18th and 19th centuries was dominated by the notion of *liberum ius ad bellum*. It was no longer a question whether a war was just in the mediaeval sense, but whether a war was conducted in conformity with the laws of war (*ius in bello*). As weaponry became ever more sophisticated, the protection of non-combatants and the observation of the principle of proportionality of means and ends\(^15\) were considered to be part of these laws of war in due course of time. Both criteria also were already recognized in the classic period of the Doctrine of Just War, as for instance

---


\(^10\) Grewe (note 4), 241—244. See also Kennedy (note 7), 32, 65—74.


\(^12\) On Grotius see: Grewe (note 4), 254—259; Peter Hoggenmacher, Grotius et la doctrine de la guerre juste, Paris 1983.


\(^14\) For historical illustration, see: Kimminich (note 3), 212. See also: Scheunner (note 9).

by Suarez, but also in the very early times by St. Augustine. Both aggressive and defensive war under the new doctrine were to be considered to be lawful action and needed no substantive, ethical legitimation or justification by positive law.

The experience, however, of the devastating wars at the end of the 19th century (inter alia the American War of Secession, the Italian struggle for national unity, the German-French War of 1871) and the two World Wars in the 20th century have confronted international law again with the problem of the ethical and legal permissibility of war as a means of politics. Yet international law did not seek a solution of this problem by a restauration or the fresh introduction of the Doctrine of Just War. A more radical approach was taken: War, and more precisely, any use of force as a political means was to be rejected as illegal and unethical. Increasing attempts at strengthening the laws of war (ius in bello) at the end of the 19th century were paralleled and — in the eyes of some international lawyers — overtaken by the demand for a general prohibition of war as well as any other kind of inter-state and international use of force.

At this point, attention must turn to the question, where modern international law, changed as it has in conformity with the demands just mentioned, stands with regard to the Doctrine of Just War. Is this doctrine still relevant or — as is contended by some authors —, has it to be considered as inadequate and thereby overcome by new rules because the criteria of just war can no longer be applied today — let alone the question whether they could have ever been applied in international law?

II. The bellum iustum Doctrine in the Light of the Prohibition of the Use of Force in Modern International Law

A survey of the relevant international law rules has to be undertaken on two levels — not the least because of the nature of the current ethical discussion within the churches. On the one hand, one must look at norms

---

relating to the general prohibition of war and the rules allowing for certain exceptions (ius ad bellum). On the other hand, one has to focus on the level of a “just” — or in modern legal terms — “lawful” conduct of war (ius in bello). Furthermore, it will have to be shown that — in considering the problem of nuclear weapons — both levels could merge in pursuance of a specific line of argument.

1. The Abolishment of the Liberum ius ad bellum in Modern International Law

The League of Nations Covenant already knew a considerable restriction of the right to go to war (Art. 11—13 of the Covenant). These restrictions were, however, more of a procedural than a substantive nature. Parties to a conflict were under an obligation first to seek a peaceful settlement of the dispute, before they could legally go to war. Furthermore, they had to observe certain cooling off periods after the failure of a peaceful settlement before force could be lawfully used. The Briand-Kellogg-Treaty (Treaty of Paris) of 1928 changed these restrictions into an explicit and general prohibition of wars of aggression — a prohibition which according to an overwhelming majority of opinion rapidly developed into a rule of customary international law, thus binding non-treaty states as well. The United Nations Charter again broadened the scope of this norm into a general prohibition of the use or the threat of use of force in international relations. Every state in the world is bound to this rule, either directly or indirectly. However, in consequence of a realistic assessment of human behaviour, whereby it is realized that prohibitions by themselves do not guarantee that the prohibited act does in fact not occur, states remain entitled to the right of individual and collective self-defence. Defensive war is still legal. Thereby, international law has legitimized the existence of today’s military alliances like the North Atlantic Treaty Organization (NATO) or the Warsaw Pact, which, indeed, have proven to

18 League of Nations Treaty Series (LNTS) 94, 57; Meyn (note 17), 56/57.
be one of the essential regional structures of international order. However, Art. 51 of the UN-Charter restricts the right to self-defense in that it can be exercised only until the UN-Security Council has taken the necessary steps for the preservation of international peace and security.

A further exception from the general prohibition of the use of force is provided for by the UN-Charter in that the Organization may collectively employ force against acts of aggression or breaches of the peace. It must be stressed at this point that these provisions in the United Nations Charter are strongly opposed to every Just War Doctrine. It may be possible to recognize the punitive nature of sanctions provided for by the League of Nations Covenant as remnants of the *bellum iustum*-Doctrine. However, the peace-keeping system as provided for by the United Nations Charter is clearly distinguishable in two ways from a theoretical deduction of just reasons for war within the framework of Just War Doctrine. Firstly, the Charter’s measures of collective security are not established within an ontological concept of peace or just order; rather, the Charter as well as modern international law draws a clear distinction between peace-keeping on the one hand and positive norms of enhancing justice among nations or so-called “peaceful change” on the other hand. Thus, the peace-keeping efforts of the Charter are meant to avoid breaches of peace already in the forefield of military conflicts. Secondly, the case of a breach of peace is not defined theoretically. Instead, Art. 39 of the Charter provides for a political procedure to determine what constitutes a breach of peace within the institutionalized framework of the Security Council. In order to meet the requirements of this procedure, the United Nations after long and frustrating debates in 1974 have adopted a Definition of Aggression which is meant to serve as the basis for decisions on whether an act of aggression has been committed. It has to be noted, however, that this Definition of Aggression is replete of general clauses and loopholes, thus rendering it of limited practical value. Thus, for instance, an act of aggression is *prima facie* deemed to have occurred if one state fires ‘the first shot’ against another, provided, however, that the Security Council does not determine otherwise.

---


Furthermore, wars of liberation waged by peoples under colonial oppression are not considered to be covered by the rules of the Definition of Aggression. There is also disagreement as to whether humanitarian intervention, i.e. the use of force for the protection of fundamental human rights (Entebbe case), is legal under international law.\textsuperscript{23}

2. The ius in bello

While the struggle for outlawing war as such is a relatively recent one — a fact which has to be recognized in order to avoid any rash conclusions about the ineffectiveness of the prohibition of war —, endeavours to limit the means of war by positive international law date back much further. It is impossible here to recall the complete number of rules of ius in bello. Only the basic traits and elements of ius in bello as they are contained in the Hague Convention on the Rules of Warfare of 1907\textsuperscript{24} and in the Geneva Conventions of 1949 and 1977\textsuperscript{25}, may be summarized at this point. Their overriding aims are the protection of civilians and the observation of the principle of proportionality. In accordance with the latter, weapons are outlawed which cause unnecessary suffering and which have an undiscriminating effect, i.e. cannot be limited to military objectives only.

These rules, aimed at providing for some degree of protection and restraint in the use of weapons extend to both parties. War — at least in theory — thereby is characterized not as an event outside the realm of law, but as regulated by particular rules of law.

And war — once it occurs legally — becomes illegal only, when those same laws are violated. This means that a defensive war as well may become illegal once a breach of the ius in bello occurs. It has to be noted with regard to nuclear weapons, however, that international law so far has tended to outlaw the first use of nuclear weapons only, but does allow for their use in answer to a nuclear attack (response in kind), thereby indicating that the mere possession of nuclear weapons is legal. There is, however, even disagreement on this basic premise in that it is maintained that even the first use of nuclear weapons out of military necessity is legal in cases of an exceptionally grave


\textsuperscript{25} United Nations Treaty Series (UNTS) 75 (1950), 31, 85, 135, 287; International Legal Materials (ILM) 16 (1977), 1391, 1442.
Doctrine of Just War

threat to a state. But even if one considers the first use of nuclear weapons to be a lawful act, its lawfulness cannot be justified in terms of objective and generally applicable criteria provided for by an ethical doctrine. Rather, a state is legally permitted to take measures of self-preservation, including the first use of nuclear weapons. Such legally permitted acts of self-preservation, however, are limited by the rules of warfare and are restricted to the preservation or restoration of the status quo ante. Thus, the defending state is entitled to use only such weapons as are necessary for the achievement of that purpose.

3. International Law Interpretations of the Existing Law with Regard to the Doctrine of Just War

The law of the prohibition of war has not been explicitly or implicitly developed in terms of the Doctrine of Just War, rather it was intended to overcome this doctrine. Yet neither international law nor ethics can avoid the question as to whether this doctrine still is relevant to international law and its future development. This is not only because the present day discussion of ethics and legal policy poses these questions ever more urgently, but because — as has been stated at the outset — law and ethics are categories closely related to each other. The number of interpretations of the existing law by international lawyers or others in the light of the Doctrine of bellum iustum is limited. In order not to confuse the picture, only the most important positions may be outlined and discussed here briefly.

a) An interesting interpretation of the prohibition of the use of force within the context of its institutional foundation, i.e. the United Nations, has been offered a few years ago by the American political scientist and international lawyer Inis Claude. In the eyes of Claude the establishment of the United Nations and the prohibition of the use of force that went with it, means the restauration of the mediaeval foundations of the Doctrine of bellum iustum, but under secular conditions. The Organization takes the place of Pope

28 Delbrück, Proportionality (note 15), 397.
29 Claude (note 2).
and Emperor as the authoritative judges over the question of whether a war is just or unjust. This parallel seems very convincing at first sight. However, it does not grasp the true problem posed by the Doctrine of Just War today: It is true, that the United Nations may be viewed theoretically as being vested with the authority to judge upon the justice or injustice of acts of war. They lack, however, the objective criteria — or criteria perceived as being objective — founded on ethics, a prerequisite of the Doctrine of Just War in the Middle Ages. The loss of the universally shared philosophy of true order is not matched by the existence of the Organization of the United Nations and their decision making process.

b) The opposite position considers the Doctrine of Just War to be overcome by international law. The views expressed by Otto Kimminich\(^{30}\) may be cited as an example: "There is, therefore, nothing left of the *ius ad bellum* of classical international law. War as a means of international politics is outlawed and ethically rejected. There is no justification of war whatsoever, and this also pertains to preventive war". The obligation to preserve the peace has thereby been put side by side with the prohibition of war. Kimminich continues: "The right of every state to individual and collective self-defense, as it is enshrined in Art. 51 of the UN-Charter, is no exception to the prohibition of war. This right . . . is comparable to the right of self-defense as it is recognized in the national legal orders. It becomes meaningful only when considered against the background of the prohibition of war. For self-defense is allowed only against criminal acts!" Self-defense exercised by a state is not a "just war", but a justified repulsion of a criminal act which, however, as such is subject to the rules of warfare, in order to bring to bear the notion of law and peace even in a situation dominated by the use of force.

From a conceptual point of view\(^{31}\), one has to agree with Kimminich that the acceptance of the right to self-defense by the United Nations was not at all intended to revive the Doctrine of Just War. In fact, however, it cannot be denied that the exercise of the right to self-defense amounts to undertaking a defensive war. Thus, the law of the United Nations — in seeming conformity with the Doctrine of Just War (for instance, as interpreted by Luther) — has reduced the right to go to war (*ius ad bellum*) to one single case, i.e.

\(^{30}\) Kimminich (note 3), 216/17 (translated from the German original).

the defense against armed aggression after attempts at a peaceful settlement have failed; but this is only in seeming conformity with the Doctrine of Just War because international society is pluralistic, adhering to heterogenous value systems and, therefore, is not in a position to prescribe objective ethical criteria for the embarking on a defensive war. Thus, a defensive war according to the law of the United Nations, is a war justified by positive law as distinguished from an ethically just war: it can, but it need not meet the criteria of an ethically just war.

While international law in restricting the right to go to war to one case, i.e. defensive war, did not adopt the Doctrine of Just War in the sense of a doctrine based on objective criteria of justice, it has, on the other hand, opened itself by the structure of the relevant norms to an ethical interpretation in terms of the Just War Doctrine. In other words, it has created conditions for a close relatedness of law and ethics in this field. In taking up this new perspective in some interpretations of present day international law — based on the traditional Doctrine of Just War —, the problem of a just defensive war including the question of a just preventive war are discussed and, furthermore, the justice of a defensive war is scrutinized under the terms of the ius in bello. Others, departing from the same methodical basis, tend to consider it impossible to undertake defensive wars in the nuclear age legally, since the ius in bello once and for all proscribes the use of nuclear weapons.

c) As examples for the first line of argument outlined above, the works of O’Brien, Ramsey and Walzer may be mentioned here. They consider defensive wars, including the use of nuclear weapons as just (and legal) if these weapons can be applied in conformity with the principle of proportionality and provided that utmost protection can be secured for non-combatants. O’Brien, in weighing the pros and cons in this context, uses the formular of “double effect” which says, although loss of civilians cannot be avoided even in restricting the application of weapons to military objectives, that this would not render the use of these weapons illegal, as long as such losses are not intentionally brought about and are as small as possible.

On the other hand, O’Brien’s factual argument — the possibility of a controlled use of nuclear weapons — is taken up and answered in the negative: a controlled use of nuclear weapons which would meet the criteria of the ius in bello was impossible. Thereby, at least the defensive war carried out with nuclear weapons is ethically rejected and considered to be illegal, — one could also say, nuclear war can no longer be judged in terms of the Doctrine of Just War. At this point — as has been mentioned before — the two levels

---

32 Supra note 1.
33 O’Brien (note 1), 42—55; Melzer (note 1), 158. Delbrück (note 16), 109 seq.
of arguments — that of the general prohibition of the right to go to war (*ius ad bellum*) and that of the *ius in bello* — merge: based on a strict application of the rules of the *ius in bello*, the general prohibition of war is extended at least to the nuclear defensive war.

These attempts at penetrating present day international law as shaped by the UN system with the categories of the classical Doctrine of Just War, either with the consequence of a limited admissibility of nuclear defensive war, or with the consequence of rendering nuclear defensive war altogether illegal thereby coming close to a pacifist stance, have not been generally accepted. This was impossible to achieve because the essential prerequisites for a full scale integration of the Doctrine of Just War into international law are lacking: The representatives of the views outlined, under the conditions of a pluralistic heterogenous international society cannot prove the criteria of just war used by them to be universally valid. However, only if this condition — universal validity of the criteria — could be met, the Doctrine of Just War could fulfill its war limiting function. As this cannot be proved, adopting the categories of just war would enhance the danger already existing of abusing the doctrine for ideological purposes.

At this point, we may conclude that the recognition by international law of defensive war as justified by positive law is categorically different from the concept of Just War in ethical terms. In this sense, adoption of the Doctrine of Just War by international law has not yet occurred. Furthermore, the Doctrine of Just War has to be considered as overcome by international law, since a lawful defensive war is limited in its aims. It may be embarked upon only for the restauration of the *status quo ante*; but it may not be undertaken for the punishment of the aggressor or for achieving a new state of order, transcending the mere purpose of defense. On the other hand, it has to be recognized that on the level of the *ius in bello* elements of the Doctrine of Just War — *i.e.* the notion of the protection of non-combatants and the principle of proportionality — have been introduced into international law and shaped its aims and scope. These are being discussed, in their full implications, however, only rather reluctantly. While trusting the effectiveness of the system of nuclear deterrence as the dominant structural element of international order in the post-war era, the legal problems implied in the failure of deterrence are more or less being neglected. In this respect, there are striking similarities with the current ethical discussion.

The result reached so far — no full scale adoption of the Doctrine of Just War by international law — is, however, challenged by new developments arising from very different backgrounds. They will be taken up in the following final section of the paper.
III. Tendencies towards a Renaissance of the Doctrine of Just War

The developments which have to be taken up here, may be exemplified by three political phenomena: the national wars of liberation of peoples under colonial rule, the military intervention of the Warsaw Pakt members in the CSSR in the context of the so-called Breznev doctrine and the US policy towards Central America and the Caribbean (Grenada, Nicaragua). All three cases have in common the first use of force or the threat of the use of force without a prior armed attack having occurred. While in the case of wars of liberation at first attempts have been made to justify them as acts of self-defense against an aggression which was seen in the continued existence of colonial rule, this line of argument was later abandoned and wars of liberation as such were regarded as generally justified. In the two other mentioned cases the justification for the use of force was argued to consist in the preservation or restauration of a particular regional order in the spheres of influence of the Superpowers. Here we encounter — at times explicitly — the criteria of the classical Just War Doctrine. The “iusta causa” is found in the achievement of national self-determination or in the preservation of peace in a region by fending off any dangers threatening the existing order. The “recta intentio” is represented by the will to preserve the peace and establish a just order (pax et iustitia).

The reasons for these tendencies are obvious. The UN system which has outlawed the active use of force as a means of politics, has utterly failed in its peace preserving function and in its task to bring about peaceful change. Thereby, it denied to the member states the necessary substitute for the use of force in cases of conflict. The regional alliances, which from the global perspective have a vital peace preserving function, are by their nature status quo orientated and, therefore, are only in a limited sense suitable for the initiation and realization of peaceful change. In the Third World such func-

34 During the negotiations of the Geneva Protocols Additional of 1977 some delegations argued, “that wars for national liberation against colonial or racist powers were just wars and for this reason had to be treated in the same way as wars between States”, Bothel/Partsch/Solf (note 26), 40.
36 Kipp (note 9); for the associated ideas “pax et iustitia” in the Mediaeval history of law see: Hans Hattenhauer, Pax et iustitia (= Berichte aus den Sitzungen der Joachim-Jungius-Gesellschaft der Wissenschaften 3), Göttingen 1983.
tioning regional systems are lacking almost completely. The reversion of some states or people to the attitudes of the epoch before the prohibition of force had become effective was therefore only a question of time. However, these are no more than practices to which legal recognition to date has not been forthcoming, even if in the case of the wars of liberation a significant number of non-binding resolutions were passed by the General Assembly of the UN, which underline the legality of such wars and call for their support. As a matter of principle, the consolidation of such tendencies from the point of view of international law ought to be strongly opposed; they could lead to a complete erosion of the principle of the prohibition of war, the normativity of which is a precarious one anyway. In view of the lack of objective criteria shared by the community of states, even an only limited admission of the first use of force for certain *iustae causae* would rapidly break the dam of the principle of the prohibition of war.

For what people, what state would not be able to show sufficiently "just causes"? As already explained regarding the existing law, the community of states lacks the basic requirements for a functioning Doctrine of Just War. Therefore, a solution of these problems must not be sought on the basis of traditional Just War Doctrine, for international law has set as its priority the preservation of peace while at the same time contributing to the establishment of an equitable world order through the development of rules defining new values. This opens up perspectives for a linkage between law and ethics in the area of international law, that appear more promising than a renaissance of the *bellum iustum* Doctrine. This is not meant to say that an ethical discussion of the body of law on the issue of war and peace has become irrelevant. Rather, this discussion ought to be undertaken not on the classical *bellum iustum* Doctrine but on the level of an ethics of *bona fide* observance of positive law.

In other words, the ethical foundation of the principle of the prohibition of force is to be found in the ethical imperative whereby those rules of positive law demanding the preservation of peace must be obeyed. In this sense, international law is dependent upon both theology and philosophy for the development of a universal legal ethic.

---
